IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Chapter VIII, Rule 32(2)(b)
Description of case

Criminal Appeal No. 171 of 2007
(Old No.2104 of 1986)

Date of decision: 31st August, 2007

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

Date Initials of Judge

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the judge for signature.

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
Criminal Appeal No. 171 of 2007
(Old No.2104 of 1986)

1. Kirti Ballabh S/o Sri Sada Nand.
2. Khima Nand S/o Sada Nand.
Both R/o Village Tara Nawar,
P.S. Haldwani, District Nainital. …….. Appellants

Versus

State …… Respondent

Mr. R.S. Sammal, Advocate for the appellants.
Mr. Amit Bhatt, Addl. Government advocate for the State.

JUDGMENT

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Dharam Veer, J.

RAJEEV GUPTA, C.J. (Oral)

The appellants have preferred this appeal under Section 374(2) Cr.P.C. against the impugned judgment dated 01.08.1986 passed by Sessions Judge, Nainital in Sessions Trial No. 229 of 1984, whereby appellant Khima Nand was convicted under Section 302 and appellant Kirti Ballabh under Section 302 read with 34 of the Indian Penal Code with sentence of Imprisonment of Life.

2. The short facts of the case, essential for deciding this appeal, are that:

A. appellants Khima Nand and Kirti Ballabh are real brothers. Informant Hari Dutt is father of Kanti Ballabh (since deceased) and Tara Devi is his sister. Kanti Ballabh was employed in Jal Sansthan at Nainital. On 19.10.1984, at about 7:00p.m., when Kanti Ballabh was taking his meals in his house and his father Hari Dutt, sister Tara Devi and mother Smt. Devki Devi were also present there, appellant Khima

Nand asked Kanti Ballabh to come out of his house. When Kanti Ballabh came out of the house, appellants Khima Nand and Kirti Ballabh inquired from Kanti Ballabh as to why water was not being supplied to their house. Kanti Ballabh replied that there was some defect in the pipeline and, as such, he could do nothing in the matter. Kirti Ballabh, not being satisfied with his reply, caught hold of Kanti Ballabh by both of his hands and exhorted his brother Khima Nand to assault him. Appellant Khima Nand took out a knife from his pocket and dealt one blow on the chest of deceased Kanti Ballabh. The alarm raised by Hari Dutt attracted witness Jaint Singh. Deceased Kanti Ballabh, after sustaining the injury on his chest, fell on the ground and both the appellants fled away from the place of occurrence. PW1 Hari Dutt and PW3 Tara Devi saw the entire incident in the light of the lantern.

B. Hari Dutt, father of Kanti Ballabh, took his injured son first to the dispensary at Village Daulatpur and then to Civil Hospital, Haldwani. The doctor, on examination, declared Kanti Ballabh dead. Hari Dutt, then, lodged the First Information Report by submitting a written report at Police Station Haldwani at 11:20 p.m. The Investigating Officer, after observing the necessary formalities of preparing inquest etc., sent the body of deceased Kanti Ballabh for Post Mortem Examination. The autopsy surgeon found one incised wound on the chest of the deceased as detailed in the Post Mortem Report (Ex. Ka. 3). During the course of investigation, accused Khima Nand and Kirti Ballabh were arrested by the police. After completion of the investigation of the case, the police filed charge sheet against the accused persons alleging commission of the offence punishable under Section 302 read with 34 I.P.C.

3. Accused Khima Nand and Kirti Ballabh abjured their guilt and pleaded false implication to the charges framed by the Trial Court under Sections 302 and 302 read with 34 of the Indian Penal Code respectively.

4. At the trial, the above charges against the accused persons were sought to be proved on the evidence of PW1 Hari Dutt, PW2 Jaint Singh, PW3 Tara Devi, PW4 Head Constable Irshad Ahmad, PW5 Sub-Inspector Karam Hussain, PW6 Dr. B.P. Agarwal and PW7 Constable Rajpal Singh. The accused persons, however, did not examine any witness in their defence.

5. Of the seven witnesses examined by the prosecution at the trial, PW1 Hari Dutt and PW3 Tara Devi are eye-witnesses of the incident of assault on deceased Kanti Ballabh, whereas PW2 Jaint Singh saw the accused persons running away from the place of occurrence.

6. The Trial Court, on a close scrutiny of the evidence led by the prosecution at the trial, found the evidence of the two eye-witnesses PW1 Hari Dutt and PW3 Tara Devi truthful and reliable. The Trial Court further found that the evidence of these two eye-witnesses was amply corroborated by the evidence of PW2 Jaint Singh and the medical evidence of PW6 Dr. B.P. Agarwal, who categorically stated that the incised wound, found on the chest of deceased Kanti Ballabh, could have been caused by means of sharp and pointed object knife. The Trial Court, therefore, held accused Khima Nand and Kirti Ballabh guilty of causing death of deceased Kanti Ballabh on 19.10.1984 and convicted and sentenced them as mentioned above.

7. Mr. R.S. Sammal, the learned counsel for the appellants vehemently argued that the Trial Court has erred in placing reliance on the eye-witness account of PW1 Hari Dutt and PW3 Tara Devi, who are highly interest witnesses, being father and sister of deceased Kanti Ballabh; the First Information Report in the case has been lodged with inordinate delay; and even if the appellants are held guilty of causing that injury on deceased Kanti Ballabh, which resulted in his death, the offence against the appellants would not amount to the offence of murder punishable under Section 302 of the I.P.C. and

would, at the most, be culpable homicide not amounting to murder and would be punishable under Section 304 Part II of the I.P.C. only.

8. Mr. Amit Bhatt, the learned Addl. Government Advocate, on the other hand, supported the impugned judgment and contended that PW1 Hari Dutt and PW3 Tara Devi are natural and truthful witnesses and the Trial Court has rightly relied upon their evidence in holding the appellants guilty; and the act of the appellants of causing incised wound on the chest resulting in the death of deceased Kanti Ballabh, in facts and circumstances of the present case, would not amount to anything short of 'murder' and would be punishable under Section 302 of the I.P.C. only.

9. The facts that deceased Kanti Ballabh sustained an incised wound on his chest in the night of 19.10.1984 and succumbed to that injury the same night were neither under challenge before the Trial Court nor are under challenge before us in this appeal. Even otherwise, there is sufficient ocular evidence of PW1 Hari Dutt and PW3 Tara Devi and the medical evidence of PW6 Dr. B.P. Agarwal on record to establish the above facts beyond any shadow of doubt. We, therefore, hold that deceased Kanti Ballabh sustained incised wound on his chest in the night of 19.10.1984 and died a homicidal death on account of the said injury.

10. According to the prosecution case, during the course of altercation between the two appellants and Kanti Ballabh, appellant Kirti Ballabh caught hold of Kanti Ballabh and appellant Khima Nand dealt one knife blow on the chest of Kanti Ballabh, who succumbed to his injury the same night.

11. PW1 Hari Dutt, father of deceased Kanti Ballabh, has categorically deposed that on the fateful day at about 7:00 p.m. when his son Kanti Ballabh was taking his meals, appellant Khima Nand asked Kanti Ballabh to come out of his house. Thereupon, his son

Kanti Ballabh went out of the house followed by this witness and Tara Devi. There was sufficient light of the lantern on the spot. In that light he saw that the two appellants were quarrelling with his son Kanti Ballabh. It is further in his evidence that, at this juncture, appellant Kirti Ballabh caught hold of his son Kanti Ballabh and exhorted his brother Khima Nand to assault him. Appellant Khima Nand then dealt a knife blow on the chest of his son Kanti Ballabh. He has further deposed that on his raising hue and cry, PW2 Jaint Singh also came to the place of occurrence. Kanti Ballabh, after sustaining the incised wound on his chest, fell on the ground and then the accused persons fled away. Injured Kanti Ballabh was taken first to Daulatpur Dispensary and then to Government Hospital, Haldwani. The Doctor at Government Hospital, Haldwani examined injured Kanti Ballabh and declared him dead. He then lodged the First Information Report (Ex.Ka.1) at Police Station Haldwani.

12. Though PW1 Hari Dutt was subjected to a lengthy cross-examination, nothing could be elicited by the defence in his cross-examination, which may render his evidence unworthy of credence. The mere fact that this witness is father of the deceased will not render his otherwise cogent and reliable evidence unreliable. Rather this witness, being father of the deceased, would be the last person on earth to spare the real assailants of his son Kanti Ballabh and to falsely implicate the two appellants. On a close scrutiny of the evidence of PW1 Hari Dutt, we find ring of truth in his evidence. In our opinion, he is a reliable witness and the Trial Court has rightly relied upon his evidence.

13. The cogent and reliable evidence of PW1 Hari Dutt stands corroborated by his own First Information Report, wherein all the essential seeds of the prosecution case were spelt out by this witness. The incident of assault on the deceased took place at 7:00 p.m. and the First Information Report was lodged at 11:20 p.m. after covering the distance of about 8 kms. In our opinion, the First Information Report

in the present case was not at all delayed and was rather promptly lodged.

14. The eye-witness account of PW1 Hari Dutt further stands corroborated by medical evidence of PW6 Dr. B.P. Agarwal, who, on Post Mortem Examination, found one incised wound of the left side of the chest of deceased Kanti Ballabh. This external injury, in the opinion of this doctor could have been caused by means of a knife. There is hardly any cross-examination of this witness and virtually no cross-examination on this point.

15. The evidence of PW1 Hari Dutt, corroborated by his own promptly lodged First Information Report and the medical evidence of PW6 Dr. B.P. Agarwal, in our considered view, is sufficient to hold appellants Khima Nand and Kirti Ballabh guilty of causing that incised wound on the chest, which resulted in the death of deceased Kanti Ballabh.

16. In addition, the prosecution has led evidence of PW3 Tara Devi, sister of deceased Kanti Ballabh, who, deposing in line with the evidence of PW1 Hari Dutt, has categorically stated that appellant Kirti Ballabh caught hold of her brother deceased Kanti Ballabh and then, on his exhortation, appellant Khima Nand dealt one knife blow on the chest of her brother Kanti Ballabh. She stood firm in her cross-examination and nothing could be elicited by the defence, which may render her evidence unworthy of credence. The learned defence counsel attacked her evidence on the ground that her presence on the spot was not disclosed in the First Information Report, which was lodged by her father PW1 Hari Dutt, and eye-witness of the incident. It is not necessary that the presence of all the eye-witnesses should be disclosed in the First Information Report. That apart, even if her evidence is kept out of consideration, the same will not adversely affect the prosecution case against the appellants, as we have found that the evidence of PW1 Hari Dutt, corroborated by his First

Information Report and the medical evidence of PW6 Dr. B.P. Agarwal, is sufficient to hold the appellants guilty.

17. Yet another witness PW2 Jaint Singh has deposed that after hearing the alarm raised by PW1 Hari Dutt, when he came out of his house, he found appellants khima Nand and Kirti Ballabh running away from the place of occurrence and, at that time, appellant Khima Nand had a knife in his hand. He further stated that deceased Kanti Ballabh was lying in an injured condition in front of his house. The minor discrepancies in his evidence, in our opinion, are not sufficient to discard his evidence altogether. Thus, the evidence of PW2 Jaint Singh also corroborates the eye-witness account of PW1 Hari Dutt and PW3 Tara Devi.

18. The infirmities pointed out by Mr. R.S. Sammal, the learned counsel for the appellants in the investigation, in out opinion, are of insignificant nature and do not adversely affect the reliability of the evidence of PW1 Hari Dutt, PW2 Jaint Singh and PW3 Tara Devi.

19. In view of the foregoing discussion of the evidence of the prosecution witnesses, we hold that the prosecution has succeeded in establishing that appellant Kirti Ballabh caught hold of deceased Kanti Ballabh in the night of 19.10.1984 outside his house and exhorted his brother co-accused Khima Nand to assault Kanti Ballabh; and appellant Khima Nand dealt one knife blow on his chest, which ultimately resulted in his death the same night. We, therefore, uphold the finding recorded by the Trial Court holding appellant Khima Nand guilty of causing that incised wound on the chest of deceased Kanti Ballabh, which proved fatal and appellant Kirti Ballabh guilty of sharing the common intention of his co-accused Khima Nand and liable with the aid of Section 34 I.P.C.

20. The next question, which crops up for our consideration in this appeal is about the nature of the offence made out against the

appellants. Whether the act of appellant Khima Nand, in causing that incised wound on the chest of deceased Kanti Ballabh which resulted in his death, will amount to the offence of 'murder' punishable under Section 302 of the Indian Penal Code as held by the Trial Court or will it amount to the offence of 'culpable homicide not amounting to murder' punishable under Section 304 of the Indian Penal Code as contended by the leaned counsel for the appellants?

21. Mr. R.S. Sammal, the learned counsel for the appellants, placing reliance on the dicta of the Apex Court in the cases of **Jawahar Lal and another Vs. State of Punjab** reported in **AIR 1983 SC 284; Jagtar Singh Vs. State of Punjab** reported in **AIR 1983 SC 463; Tholan Vs. State of Tamil Nadu** reported in **1984 CRI.L.J. 478; Hem Raj Vs. The State (Delhi Administration)** reported in **AIR 1990 SC 2252; Ranjitsinh Chandrasinh Atodaria Vs. State of Gujarat** reported in **AIR 1994 SC 1060;** and **Salim Sahab Vs. State of M.P.** reported in **(2007) 1 SCC 699,** contended that as there was no prior ill-will between deceased Kanti Ballabh and appellant Khima Nand; the unfortunate incident of assault on deceased Kanti Ballabh took place all of the sudden during the course of an altercation between them; and appellant Khima Nand is said to have dealt a solitary blow on deceased Kanti Ballabh by means of a knife, which unfortunately proved fatal, the offence against appellant Khima Nand would not travel beyond the one punishable under Section 304 Part II of the Indian Penal Code.

22. Mr. Amit Bhatt, the learned Addl. Government Advocate, on the other hand, highlighting that appellant Khima Nand used a dangerous weapon knife; the most vital part of the body, chest, was selected for causing the injury; and the injury found on the chest of the deceased, in the opinion of the autopsy surgeon, was sufficient in the ordinary course of nature to cause death, contended that the act of appellant Khima Nand, of causing incised wound on the chest of the deceased leading to his death, would certainly amount to the offence

of ‘murder’ and would be punishable under Section 302 of the Indian Penal Code only.

23. PW1 Hari Dutt, the father of the deceased, in para 11 of his statement, has categorically stated that there was no prior ill-will or dispute between them and the appellants and they used to visit each others house. There is not even an iota of evidence to even suggest any ill-will, dispute or enmity between the appellants and deceased Kanti Ballabh, which could have motivated the appellants to intend to cause his death.

24. It is the prosecution case itself and the same is evident from the evidence of PW1 Hari Dutt and PW3 Tara Devi that the assault on deceased Kanti Ballabh, at the hands of appellant Khima Nand, was preceded by an altercation between the appellants and the deceased. It appeaers that the appellants were harbouring under the impression that deceased Kanti Ballabh was responsible for the water scarcity in their house. It was in this background that when the deceased replied that the non-availability of water was on account of the defect in the pipeline and he could do nothing in the matter, the appellants got enraged and, in the heat of passion, appellant Kirti Ballabh caught hold of the deceased and the other appellant Khima Nand dealt a solitary knife blow on his chest.

25. It is further apparent from the evidence of the two eye-witnesses PW1 Hari Dutt and PW3 Tara Devi that, after dealing of the knife blow on the chest of the deceased, none of the witnesses intervened or prevented the appellants from repeating further blows on the deceased. The evidence of the eye-witnesses is rather to the effect that immediately after dealing the solitary knife blow on the chest of the deceased, the appellants fled away from the place of occurrence.

26. This, it emerges out that there was no prior ill-will between the two appellants and deceased Kanti Ballabh; appellant Khima Nand had dealt a solitary blow on deceased Kanti Ballabh by means of a knife; and this solitary blow, too, was dealt during the course of an altercation between the deceased and the appellants over a very trivial and petty issue relating to no-supply of water to the appellants' house.

27. The Apex Court, in the case of **Jawahar Lal and another Vs. State of Punjab** reported in **AIR 1983 SC 284,** while considering the offence made out against the appellants in that case, observed in paras 12 to 15, 19 & 20:

> "12. The only question, we have to examine is whether under these circumstances the offence would be under Section 302 of the Indian Penal Code.
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> 13. <u>According to the learned Sessions Judge, the first appellant was aged 19 years at the time of the occurrence. He has given one blow with a knife. When on receipt of the blow deceased Darshan Singh fell on the ground, there is not the slightest suggestion that the first appellant ever attempted to cause any more harm to deceased Darshan Singh.</u>
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> 14. Section 300 IPC provides that culpable homicide is murder firstly if act by which the death is caused is done with the intention of causing death or, thirdly – if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. There are two other paras setting out circumstances in which culpable homicide would amount to murder. But they are not relied upon by the learned counsel Shri Ashwa ni Kumar and therefore, need not be referred to here. It is, therefore, necessary to confine the examination whether on the facts not now in dispute either para 1 or para 3 or Section 300 is attracted.
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> 15. It was not seriously questioned that para 1 would not be attracted. In the facts and circumstances of this case, as succinctly set out, it is difficult to say that the first appellant intended to cause the death of the deceased. Emphasis was laid on para 3 and it was urged

that the case would be covered by para 3 of Section 300. It was urged that the first appellant not only intended to cause a particular injury which is alleged to have been inflicted, but on objective evidence of the medical officer the injury inflicted is shown to be sufficient in the ordinary course of nature to cause death, and therefore, para 3 would attracted. Following a trivial dispute, first appellant, be a young immature boy aged about 19 years, gave one blow with a knife. The incident occurred at about 10.00 p.m. The light available was from an electric lamp post in the street. In this light upon a trivial quarrel, only one blow without any attempt at giving a second blow, was inflicted and that fell on the chest. Could it be said that the injury which inflicted was the particular injury which was intended to be inflicted? If the answer is in the negative and it ought to be so, the important requirement in the first part of para 3 would not be satisfied. Merely because the blow landed on a particular spot on the body, divorced from the circumstances in which the blow was given, it would be hazardous to say that the first appellant intended to cause that particular injury. The weapon used was the usual handy weapon, a Punjabi generally carries a knife. The first appellant was near his shop. He did not attempt to inflict any more harm. In the available dim light, the blow landed on the chest. In our opinion, in these circumstances, it would be difficult to say that the first appellant intended to cause that particular injury. Even if the injury inflicted proved to be fatal, the case would not be covered by para 3 of Section 300.

19. Having kept this criteria under view, we are of the opinion that the offence committed by the first appellant would not be covered by clause thirdly of para 3 of Section 300 and therefore, the conviction under Section 302 IPC cannot be sustained.

20. What then is the offence committed by the first appellant Looking to the age of the first appellant at the time of the occurrence, the nature of the weapon used, the circumstances in which one blow was inflicted, the time of the day when the occurrence took place and the totality of other circumstances, namely, the previous trivial disputes between the parties, we are of the opinion that the first appellant could be attributed the knowledge that he was likely to cause an injury which was likely to cause death. Accordingly, the first appellant is shown to have committed an offence under Section 304 Part II of the Indian Penal Code and he must be convicted for the same and sentenced to suffer rigorous imprisonment for five years maintaining the sentence of fine."

28. In the case of **Jagtar Singh Vs. State of Punjab** reported in **AIR 1983 SC 463,** wherein accused Jagtar Singh was found guilty of dealing one knife blow on the chest of the deceased resulting in his death, the Apex Court, while holding that the above act of accused Jagtar Singh was punishable under Section 304 Part II of the I.P.C. only, observed in paras 7 & 8:

> "7. Undoubtedly, PW 2 Dr H.S. Gill opined that the blow on the chest pierced deep inside the chest cavity resulting in the injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. The question is whether in the circumstances in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about he conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no premeditation. There was no malice. The meeting was chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could no be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in Jagrup Singh v. State of Haryana (1981) 3 SCC 616: (AIR 1981 SC 1552). It was subsequently followed in Randhir Singh v. State of Punjab decided on September 18, 1981: (reported in AIR 1982 SC 55) and Kulwant Rai v. State of Punjab (Criminal Appeal No. 630/81 decided on August 7, 1981: (reported in AIR 1982 SC 126). Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh, His conviction for an offence under Section 302 IPC and sentence of imprisonment for life are liable to be set aside.
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> 8. The next question is what offence the appellant is shown to have committed? In a trivial quarrel the

appellant wielded weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. Therefore, the appellant is shown to have committed an offence under Section 304 Part II of the IPC and a sentence of imprisonment for five years will meet the ends of justice."

29. While considering the nature of the offence made out against the accused in the case of **Tholan Vs. State of Tamil Nadu** reported in **1984 CRI.L.J. 478,** the Apex Court aging reiterated the same view and observed in para 12:

"12. It is equally not in dispute that appellant gave only one blow with a knife. Appellant had no quarrel or dispute with deceased Sampat. It is not shown that deceased Sampat had anything to do with the chit organised by K.G. Rajan. No malice has been alleged to have been entertained by the accused towards deceased Sampat. The incident occurred on the spur of the moment. It appears that the house of the deceased Sampat was somewhere near the house in which the organisers or at least one of them was residing. Appellant had his dispute and grievance with the organisers of the chit. It is the prosecution case that accused abused organisers of the chit. Deceased Sampat is not shown to be the organiser of chit. Probably when the deceased Sampat told the accused not to misbehave in the presence of ladies and not to use vulgar and filthy language, the appellant retorted by questioning the authority of Sampat to ask him to leave the place. Presence of Sampat is wholly accidental. Altercation with Sampat was on the spur of the moment, even the meeting was accidental. There arose a situation in which appellant probably misguided by his own egocentric nature objected as to why Sampat should ask him to leave the place and in this background he gave one blow with a knife which landed on the right side chest of deceased, which has proved fatal. Could the appellant be said to have committed murder? In other words, whether Part I or Part III of Section 300 IPC would be attracted in the facts of this case. Even Mr Rangam learned counsel for the Sate of Tamil Nadu could not very seriously contend that the appellant intended to commit murder of Sampat. His

submission was that at any rate appellant, when he wielded a weapon like a knife and gave a blow on the chest, a vital part of the body, must have intended to cause that particular injury and this injury is objectively found by the medical evidence to be fatal and therefore Part III of Section 300 would be attracted. On this aspect, the decisions are legion and it is not necessary to recapitulate them here merely to cover idle parade of familiar knowledge. One can profitably refer to Jagrup Singh v. State of Haryana (1981) 3 SCC 616: (AIR 1981 SC 552), Randhir Singh v. State of Punjab AIR 1982 SC 55: (1982 CRL.L.J. 195), Kulwant Rai v. State of punjab AIR 1982 SC 126 and Hari Ram v. State of Harayana AIR 1983 SC 185 : (1983 CRI.L.J. 346). To this list two more cases can be added: Jagtar Singh v. State of Punjab and Ram Sunder v. State of U.P. Having regard to the ratio of each of these decisions, we are satisfied that even if Exception I is not attracted, the requisite intention cannot be attributed to the appellant. But in the circumstances herein discussed he wielded a weapon like a knife and therefore he can be attributed with the knowledge that he was likely to cause and injury which was likely to cause death. In such a situation, he would be guilty of committing an offence under Section 304 Part II of the Indian Penal Code. Regard to the circumstances of the case, a sentence of 5 Years would be quite adequate."

30. This question again came up for consideration before the Apex Court in the case of **Hem Raj Vs. The State (Delhi Administration)** reported in **AIR 1990 SC 2252**, wherein the Apex Court, while holding that the act of the accused did not amount to the offence of murder punishable under Section 302 of the I.P.C. and was punishable under Section 304 Part II of the I.P.C. only, observed in paras 11 to 14:

"11. The only question that remains to be considered on the established facts of the case is whether the offence committed by the appellant is the one punishable under Section 302 IPC. It transpires from the evidence that the wife of the appellant is the niece of PW 20 who is the wife of PW 16 and mother of the deceased. The complaint made against PW 20 was that she was not allowing the wife of the appellant to live with him. Taking the cause of the appellant, the acquitted accused Daulat Ram went to the house of PW 16 on October 3, 1972 at 12.30 p.m. and questioned the conduct of PW 20

in interfering with the family affairs of the appellant, reprimanded her and also threatened her with dire consequences. PW 20 had reported this incident to her husband, PW16 on that evening. Thereupon PW 16 tried to meet Daulat, but could not do so. So he complained the matter to the neighbours. This was the proximate cause according to the prosecution for the perpetration of this crime.

12. On the day of occurrence at 7.30 a.m. when PW16 was standing in the verandah of his house, the appellant and his three other associates came there and threw a challenge stating that they would prove the complaint of PW 16 as baseless. On hearing the sudden outcry, the deceased who was inside the house rushed outside and thereafter this unfortunate incident had occurred. The background of the situation reveals that PW 16 was aggrieved at the conduct of Daulat for having reprimanded his wife on October, 3, 1972. Therefore, it is but natural when the appellant and three others threw a challenge, PW 16 would also have been infuriated. The deceased who was in the prime of his youth and who should have felt aggrieved at the conduct of the appellant and others for having reprimanded his mother and thereafter having picked up a quarrel with his father, had rushed outside the house evidently to take side with his father. It was under that circumstance the appellant inflicted a single stab resulting in his death.

13. In our considered view, a true and accurate version of the prosecution as to the origin and genesis of the occurrence in not brought out clearly. Nonetheless, it is inferable from the circumstances that the occurrence had happened in a spur of moment and in the heat of passion upon a sudden quarrel. The above inference is fortified by the admission of PW17 admitting that both the appellants and the deceased suddenly grappled with each other and the entire occurrence was over within a minute. Thus, it is clear that it was during the course of the sudden quarrel the appellant gave a single stab which unfortunately landed on the chest of the deceased causing an injury which in the opinion of the medical Officer was sufficient in the ordinary course of nature to cause death.

14. The question is whether the appellant could be said to have caused that particular injury with the intention of causing death of deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the intention to cause that particular fatal injury; but he could be imputed with the knowledge

that he was likely to cause an injury which was likely to cause death. Because in the absence of any positive proof that the appellant caused the death of the deceased with the intention of causing death of intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither clause I nor clause III of Section 300 IPC will be attracted. We are supported in this view by a series of decisions of this Court, namely, (1) Jagrup Singh v. State of Haryana (1981) 3 SCC 616: (AIR 1981SC 1552), (2) Kulwant Rai v. State of Punjab (1981) 4 SCC 245: (AIR 1982 SC 126), (3) Randhir Singh v. State of Punjab (1981) 4 SCC 484: (AIR 1982 SC 55), (4) Gurmail Singh v. State of Punjab (1982) 3 SCC 185: (AIR 1982 SC 1466) and (5) Jagtar Singh v. State of Punjab (1983) 2 SCC 342: (AIR 1983 SC 463). Following the ratio of the aforementioned decisions, we hold in the present case that the offence committed by the appellant is the one punishable under Section 304 Part II IPC but not under Section 302 IPC."

31. In the case of **Ranjitsinh Chandrasinh Atodaria Vs. State of Gujarat** reported in **AIR 1994 SC 1060,** the Apex Court held in para 4:

"4. We have gone through the evidence of PW-2. He is the brother of the deceased as well as of the appellant. The whole incident took place because of a quarrel that preceded. The dispute was regarding a house which has been under the occupation of the brothers sometime or the other. PW-2 in his evidence has categorically stated that there was a quarrel between the deceased and the accused namely the other brothers. It is not even clear whether the other accused where aware that the appellant was even armed with a knife during the quarrel at 9.30 P.M. or 10 P.M. when the occurrence took place. The doctor found only one stab injury which unfortunately was on the neck because of the blow landing there. Under these circumstances it becomes very difficult to hold that he intended to cause that particularly injury which was found to be sufficient in the ordinary course of nature to cause to death by the doctor. The cause of death was due to shock and haemorrhage because of the cut of carotid and other surrounding arteries. PW-2's evidence namely that there was a quarrel is also supported by the evidence of PW-3. The evidence of these two witnesses indicate that there was sudden quarrel and fight ensued. Therefore, the intention to cause that particular injury cannot be spelt out from the

act committed by the appellant. So far as the presence of PW-2 is concerned, we are satisfied that he must have been there and witnessed the occurrence and his injury cannot be held to be self-inflicted. It is only an opinion of the doctor while answering the suggestion made to him. For all the above reasons we set aside the conviction of the appellant under S. 302 I.P.C. and sentence of imprisonment for life awarded thereunder. Instead we convict him under S. 304 Part-II I.P.C. and sentence him to undergo ten years' Rigorous Imprisonment. If the appellant has already served out the sentence he may be released. But this is subject to the verification."

32. The Apex Court, in a recent dictum in the case of **Salim Sahab Vs. State of M.P.** reported in **(2007) 1 SCC 699,** reiterating the same view, observed in paras 16 to 18:

"**16**. "17. The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin o the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1.

18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have

been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the applicati on of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

19. Whether the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan [(1993) 4 SCC 238] it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage."

The above position was highlighted in Babulal Bhagwan Khandare v. State of Maharashtra [(2005) 10 SCC 404] (SCC pp. 410-11, paras 17-19).

17. The factual scenario shows that during a quarrel between the deceased and the accused, they were grappling and during that quarrel, the accused attacked the deceased with a pair of scissors. It was not a very big-sized weapon thought it was certainly having a sharp-edged point.

18. In view of the factual position as noted above the applicable provision would be Section 304 Part II IPC and not Section 302 IPC. The conviction is accordingly

altered. Custodial sentence of seven years' rigorous imprisonment would suffice."

33. Reverting to the present case, appellant Khima Nand has been found guilty of causing solitary incised wound on the chest of deceased Kanti Ballabh by means of a knife. True, the solitary incised wound resulted in damage to the internal organs, including the heart, and the injury, in the opinion of the autopsy surgeon, was sufficient in the ordinary course of nature to cause death. This solitary incised wound was caused by appellant Khima Nand during the course of altercation between him and deceased Kanti Ballabh. The altercation between them was over a very trivial issue regarding the non-supply of water to the taps in the house of the appellants. The appellants were harbouring under the impression that deceased Kanti Ballabh, who was an employee of the Jal Sanstahan, was responsible for the non-supply of water. It was in this background that when deceased Kanti Ballabh expressed his inability to help the appellants in the matter, appellant Khima Nand got enraged and, in the heat of passion and on the spur of moment, caused solitary incised wound on the chest of the deceased. The above proved act of appellant Khima Nand of causing solitary incised wound on the chest of the deceased resulting in his death, when examined in the context of the absence of any prior ill-will or inimical background between the appellants and the deceased, we find it difficult to hold with any amount of certainty that appellant Khima Nand while dealing the solitary incised wound on the chest of the deceased, had intended to cause his death. We, therefore, find it quite unsafe to uphold the conviction of appellant Khima Nand for the offence of 'murder' punishable under Section 302 I.P.C.

34. Nevertheless, appellant Khima Nand cannot escape from the liability of his act of causing incised wound on the chest of the deceased, resulting in his death, altogether. In our considered view, the above proved act of appellant Khima Nand would certainly

Amount to the offence of ‘culpable homicide not amounting to murder’ and, in the facts and circumstances of the present case, would be punishable under Section 304 Part II of the Indian Penal Code. Considering the totality of the circumstances, we are of the opinion that the custodial sentence of 7 years would be the sufficient punishment for the proved act of appellant Khima Nand and would meet the ends of justice.

35. Appellant Kirti Ballabh has been proved to have come to the house of deceased Kanti Ballabh with his co-accused Khima Nand; he caught hold of deceased Kanti Ballabh; he exhorted appellant Khima Nand to finish the deceased; and he left the place of occurrence with appellant Khima Nand. These proved facts against appellant Kirti Ballabh are sufficient to establish that he also shared the common intention of appellant Khima Nand.

36. The Apex Court in the case of **Israr Vs. State of U.P.** reported in **(2005) 9 SCC 616,** while holding the appellant guilty with the aid of Section 34 I.P.C., observed in paras 20,21,26 &27:

> “20. In addition, the dying declaration which was recorded by CW1 clearly establishes the roles played by the accused persons. Nothing has been shown as to how the same suffers from any infirmity. It is to be noted that before the trial court the accused persons did not dispute that the death of the deceased was as a result of injuries found by PW1. Merely on the hypothetical plea that the deceased could have been saved with better treatment, the charge of murder does not get diluted. The plea is clearly untenable in view of Explanation 2 appended to Section 299 IPC. The evidence of PW 3 to PW 5 is consistent that the accused-appellant restrained the movement of the deceased and held him while the other co-accused inflicted the knife-blows.
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> 21. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one

person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* [(1977) 1 SCC 746] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

26. In *Afrahim Sheikh v. State of W.B.* (AIR 1964 SC 1263) this Court stated that no doubt a person is only responsible ordinarily for what he does and Section 38 IPC ensures that. But Section 34 as well as Section 35 provide that if the criminal act is the result of the common intention, then every person who did the criminal act with such intention would be responsible for the total offence irrespective of the share which he had in its perpetration. The logic, highlighted illuminatingly by the Judicial Committee in the illustrious case of *Barendra Kumar Ghosh v. King Emperor* (AIR 1925 PC 1), is that in crimes as in other things "they also serve who only stand and wait."

27. Section 34 has, therefore, been rightly applied."

37. Appellant Kirti Ballabh, therefore, is liable to be convicted under Section 304 Part II read with 34 I.P.C. He, too, deserves custodial sentence of seven years.

38. For the foregoing reasons, the appeal filed by appellants Khima Nand and Kirti Ballabh against their conviction and sentences is allowed in part. The conviction of appellant Khima Nand under Section 302 and of appellant Kirti Ballabh under Section 302 read with 34 of the Indian Penal Code and sentences of Imprisonment for Life, recorded by the Trial Court, are hereby set aside. Instead, appellant Khima Nand is convicted under Section 304 Part II I.P.C. and Kirti Balalbh under Section 304 Part II read with 34 of the Indain Penal Code and both the appellants are sentenced to undergo rigorous imprisonment for 7 years each.

39. Appellants Kirti Ballabh and Khima Nand are on bail. Their bail bonds are cancelled.

40. The Trial Court is directed to take steps for making the appellants to serve out the balance of the sentence now awarded.

(Dharam Veer, J.) **(Rajeev Gupta, C.J.)**

31.08.2007 31.08.2007